

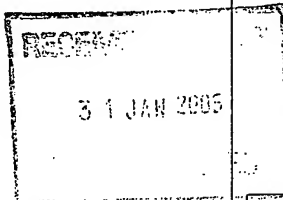
PATENT COOPERATION TREATY

From the
INTERNATIONAL PRELIMINARY EXAMINING AUTHORITY

PCT

To:

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GRANDE BRETAGNE



NOTIFICATION OF TRANSMITTAL OF THE INTERNATIONAL PRELIMINARY EXAMINATION REPORT

(PCT Rule 71.1)

Date of mailing

(day/month/year)

28.01.2005

Applicant's or agent's file reference

Y2121

IMPORTANT NOTIFICATION

International application No.

PCT/GB 03/04846

International filing date (day/month/year)

10.11.2003

Priority date (day/month/year)

14.11.2002

Applicant

NUTREN TECHNOLOGY LIMITED et al.

1. The applicant is hereby notified that this International Preliminary Examining Authority transmits herewith the international preliminary examination report and its annexes, if any, established on the international application.
2. A copy of the report and its annexes, if any, is being transmitted to the International Bureau for communication to all the elected Offices.
3. Where required by any of the elected Offices, the International Bureau will prepare an English translation of the report (but not of any annexes) and will transmit such translation to those Offices.
4. **REMINDER**

The applicant must enter the national phase before each elected Office by performing certain acts (filing translations and paying national fees) within 30 months from the priority date (or later in some Offices) (Article 39(1)) (see also the reminder sent by the International Bureau with Form PCT/IB/301).

Where a translation of the international application must be furnished to an elected Office, that translation must contain a translation of any annexes to the international preliminary examination report. It is the applicant's responsibility to prepare and furnish such translation directly to each elected Office concerned.

For further details on the applicable time limits and requirements of the elected Offices, see Volume II of the PCT Applicant's Guide.

The applicant's attention is drawn to Article 33(5), which provides that the criteria of novelty, inventive step and industrial applicability described in Article 33(2) to (4) merely serve the purposes of international preliminary examination and that "any Contracting State may apply additional or different criteria for the purposes of deciding whether, in that State, the claimed inventions is patentable or not" (see also Article 27(5)). Such additional criteria may relate, for example, to exemptions from patentability, requirements for enabling disclosure, clarity and support for the claims.

Name and mailing address of the international
preliminary examining authority:



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PATENT COOPERATION TREATY

PCT



INTERNATIONAL PRELIMINARY EXAMINATION REPORT

(PCT Article 36 and Rule 70)

Applicant's or agent's file reference Y2121	FOR FURTHER ACTION See Notification of Transmittal of International Preliminary Examination Report (Form PCT/PEA/416)	
International application No. PCT/GB 03/04846	International filing date (<i>day/month/year</i>) 10.11.2003	Priority date (<i>day/month/year</i>) 14.11.2002
International Patent Classification (IPC) or both national classification and IPC A61B5/087		
Applicant NUTREN TECHNOLOGY LIMITED et al.		

1. This international preliminary examination report has been prepared by this International Preliminary Examining Authority and is transmitted to the applicant according to Article 36.
2. This REPORT consists of a total of 6 sheets, including this cover sheet.
- ☒ This report is also accompanied by ANNEXES, i.e. sheets of the description, claims and/or drawings which have been amended and are the basis for this report and/or sheets containing rectifications made before this Authority (see Rule 70.16 and Section 607 of the Administrative Instructions under the PCT).
- These annexes consist of a total of 10 sheets.

3. This report contains indications relating to the following items:
- I ☒ Basis of the opinion
 - II ☐ Priority
 - III ☐ Non-establishment of opinion with regard to novelty, inventive step and industrial applicability
 - IV ☐ Lack of unity of invention
 - V ☒ Reasoned statement under Rule 66.2(a)(ii) with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement
 - VI ☐ Certain documents cited
 - VII ☐ Certain defects in the international application
 - VIII ☐ Certain observations on the international application

Date of submission of the demand 24.04.2004	Date of completion of this report 28.01.2005
Name and mailing address of the international preliminary examining authority:  European Patent Office - Gitschiner Str. 103 D-10958 Berlin Tel. +49 30 25901 - 0 Fax: +49 30 25901 - 840	Authorized Officer Völlinger, M Telephone No. +49 30 25901-597 

INTERNATIONAL PRELIMINARY
EXAMINATION REPORT

International application No. PCT/GB 03/04846

I. Basis of the report

1. With regard to the **elements** of the international application (*Replacement sheets which have been furnished to the receiving Office in response to an invitation under Article 14 are referred to in this report as "originally filed" and are not annexed to this report since they do not contain amendments (Rules 70.16 and 70.17):*

Description, Pages

1, 2, 4-7, 9-17 as originally filed
3, 3a, 8 received on 13.08.2004 with letter of 11.08.2004

Claims, Numbers

1-36 received on 13.08.2004 with letter of 11.08.2004

Drawings, Sheets

1/2-2/2 as originally filed

2. With regard to the **language**, all the elements marked above were available or furnished to this Authority in the language in which the international application was filed, unless otherwise indicated under this item.

These elements were available or furnished to this Authority in the following language: , which is:

- ☐ the language of a translation furnished for the purposes of the international search (under Rule 23.1(b)).
☐ the language of publication of the international application (under Rule 48.3(b)).
☐ the language of a translation furnished for the purposes of international preliminary examination (under Rule 55.2 and/or 55.3).

3. With regard to any **nucleotide and/or amino acid sequence** disclosed in the international application, the international preliminary examination was carried out on the basis of the sequence listing:

- ☐ contained in the international application in written form.
☐ filed together with the international application in computer readable form.
☐ furnished subsequently to this Authority in written form.
☐ furnished subsequently to this Authority in computer readable form.
☐ The statement that the subsequently furnished written sequence listing does not go beyond the disclosure in the international application as filed has been furnished.
☐ The statement that the information recorded in computer readable form is identical to the written sequence listing has been furnished.

4. The amendments have resulted in the cancellation of:

- ☐ the description, pages:
☐ the claims, Nos.:
☐ the drawings, sheets:

**INTERNATIONAL PRELIMINARY
EXAMINATION REPORT**

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5. ☐ This report has been established as if (some of) the amendments had not been made, since they have been considered to go beyond the disclosure as filed (Rule 70.2(c)).

(Any replacement sheet containing such amendments must be referred to under item 1 and annexed to this report.)

6. Additional observations, if necessary:

V. Reasoned statement under Article 35(2) with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement

1. Statement

Novelty (N)	Yes: Claims	9,16-21,34
	No: Claims	1-8,10-15,22-33,35,36
Inventive step (IS)	Yes: Claims	9,34
	No: Claims	1-8,10-33,35,36
Industrial applicability (IA)	Yes: Claims	1-36
	No: Claims	

2. Citations and explanations

see separate sheet

Re Item V

Reasoned statement with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement

1. Reference is made to the following documents:
D1: US 2002/0062069 A (MAULT J R) 23 May 2002 (2002-05-23)
D2: WO 01/08554 A (HEALTHETECH INC) 8 February 2001 (2001-02-08)

The documents were not cited in the international search report.

2. The present application does not meet the criteria of Article 33(1) PCT, because the subject-matter of **claims 1 - 8, 10 - 15, 22 - 25** is not new in the sense of Article 33(2) PCT.
 - 2.1. The document D1 discloses (the references in parentheses applying to this document):
A respiratory calorimeter (10 in FIG. 5; Note: The term "a breath monitoring device in the form of a calorimeter" is not clear and construed as a respiratory calorimeter) comprising
 - means to record a first breath parameter of calories expended by a user (52 in FIG. 5; paragraphs 50, 51; Note: It is not clear what a "breathing state of calories expended" shall refer to. Therefore, this feature is construed as being directed to a breath parameter of calories expended), and
 - means to detect a deviation from the recorded breath parameter in a subsequent use of the device by a user (cf. paragraph 63, the software running on PDA 52 in FIG. 5 detects changes in RMR measurements).

The subject-matter of **claim 1** is, therefore, anticipated by the disclosure of document D1.

- 2.2. The supplementary features introduced in dependent **claims 2-8, 10-15, 22-25** are also already anticipated by document D1, see in particular FIG. 5, paragraphs 47 and 51.

3. Dependent **claims 16 - 21** do not contain any features which, in combination with the features of any claim to which they refer, meet the requirements of the PCT in respect of inventive step (Article 33 (3) PCT), the reasons being as follows:

The detection of a too high flow rate and stop of operation of the device in such a case is already known from the respiratory calorimeter disclosed in document D2, cf. page 50, lines 4-15. It would therefore be obvious to the person skilled in the art, to apply these features with corresponding effect to a respiratory calorimeter according to document D1, thereby arriving at a respiratory calorimeter according to claims 16-21.

4. The combination of the features of dependent **claim 9** is neither known from, nor rendered obvious by, the available prior art. The reasons are as follows:

- 4.1. The document D1, which is regarded as being the closest prior art to the subject-matter of claim 9, discloses a breath monitoring device comprising the features of claim 1, see point 2.1 above.
- 4.2. The subject-matter of claim 9 differs from this known device in that the means to detect a deviation from the recorded breath parameter (cf. point 2.1 above for interpretation of the unclear features) comprises means to detect when a user other than the first user uses the device.
- 4.3. The subject-matter of claim 9 is therefore new (Article 33(2) PCT).
- 4.4. The problem to be solved by the present invention may be regarded as to provide a breath monitoring device which is capable of monitoring the breathing state of more than one user over a period of time.
- 4.5. The solution to this problem proposed in claim 9 is neither disclosed nor suggested in any of the documents cited in the international search report. As a consequence, the subject-matter of claim 9 is considered as involving an inventive step (Article 33(3) PCT).
5. When operating, the device of document D1 carries out the method as defined in independent method **claim 26** and dependent claims **27-33, 35, and 36**, see the

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EXAMINATION REPORT - SEPARATE SHEET**

International application No. PCT/GB 03/04846

passages cited in point 2 above. The subject-matter of **claims 26 - 33, 35, and 36** is, therefore, also not new in the sense of Article 33(2) PCT.

6. The combination of the features of dependent **claim 34** is neither known from, nor rendered obvious by, the available prior art. The reasoning set out above in point 4 applies *mutatis mutandis* to the method defined in claim 34.